No. 13,727

United States Court of Appeals

For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

BRIEF OF AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC., RESPONDENT.

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INTRODUCTORY.

The main issue in this case is simply whether Consolidated Flower Shipments, Inc.—Bay Area, petitioner, (hereinafter referred to as Bay Area) has engaged and continues to engage as an indirect air carrier of property as a common carrier for compensation or hire in interstate commerce in violation of the Civil Aeronautics Act of 1938 (49 U.S. Code 401) (52 Stat. 977) (hereinafter referred to as Act), and without license or authority from the Civil Aeronautics Board (hereinafter referred to as Board). The Board has so determined.

Airborne Flower and Freight Traffic, Inc. (hereinafter referred to as Airborne) holds letter of registration No. 14, issued by the Board, as an air freight forwarder, and appears in this case on the basis of a formal complaint which it filed with the Board, the hearing on which was consolidated with the Board proceeding by order of the Board, dated December 29, 1951. The complaint was filed pursuant to statutory authority, Civil Aeronautics Act Section 1002a, (49 U. S. Code 642) (52 Stat. 1018).

With few exceptions, Bay Area does not attack the factual findings of the Board but it does disagree with the conclusion based on these findings, that Bay Area is a common carrier and therefore subject to the terms of the Act and Board jurisdiction.

So far as physical operations of Bay Area are concerned, it is admitted on page 1 of Bay Area's brief:

> "* * * petitioner has no quarrel with the findings of the Board that in so far as the physical aspects of the operations and services performed by Bay Area in behalf of its members, in assembling and consolidating their shipments, and arranging for the transportation thereof by air and arranging for the ultimate distribution to consignees of the members of Bay Area, the operations are not unlike those usually performed by common carrier air freight forwarders."

It might be pointed out that the Board did not find it necessary to determine whether Bay Area is an air freight forwarder under the definition contained in Part 296 of the Economic Regulations (45

F. R. 3522). It concluded that Bay Area was acting as a common carrier for compensation under the Act and is operating as an indirect air carrier in violation of Section 401a thereof (Board Opinion, p. 5). (The opinion and order of the Board, Order No. E-7139, dated February 5, 1953, is before this Court in mimeographed form by stipulation. The Board opinion incorporates as an appendix fourteen pages of the initial decision of Examiner Walsh and reference thereto will be noted in this brief as Board Opinion, Appendix.)

Bay Area argues mainly that because it has a limited membership consisting of flower shippers from one locality it does not hold its services out to the public, and cannot be considered a common carrier.

It must be kept in mind that what does or does not constitute common carriage necessarily depends not only on the type of operation conducted but on the quantity of commodities which might and do move, and the manner of transportation involved. The carriage of air freight is in its infancy and to date a limited number of types of commodities are carried; for instance, perishables such as flowers going across the continent naturally lend themselves to air transportation. The same is true of electronic equipment, machine parts, drugs and other similar items where speed of transportation is most important. Viewed in this light, if fifty percent of the flower business in a certain locality is carried by one agency such as Bay

Area composed of about one-half of the shippers of that commodity who have banded themselves together in order to secure speedy and cheap transportation, it can well be found, as the Board found, that such an agency is a common carrier, particularly where the flowers are shipped not to a few consignees but to 750 consignees situated throughout the United States (Board opinion, Appendix, p. 11).

It might likewise be pointed out at the outset that Bay Area is not a cooperative as that term is ordinarily considered. The flowers of the individual members are not pooled and the proceeds of sales are not divided. The members themselves at all times own the flowers and Bay Area acts as a transportation agency. Bay Area does not own or sell a single flower.

I. STATUTORY PROVISIONS.

The Civil Aeronautics Act of 1938 provides in Section 1(2) (49 U. S. Code 401) (52 Stat. 977):

> " 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such period as may be in the public interest."

Under the proviso clause above set forth, the Board in Economic Regulations Part 296 defined air freight

forwarders and exempted them from certain provisions of the Act.

Section 1(10) provides:

> " 'Air transportation' means interstate, overseas or foreign air transportation or the transportation of mail by aircraft."

Interstate air transportation, with which we are concerned, is defined in Section 1(21):

> " 'Interstate air transportation' * * * mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft in commerce between respectively * * *" (places within the United States, etc.)

Section 401(a) of the Act (49 U. S. Code 481) provides:

> "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * *."

In Section 1(2), heretofore quoted, and Section 416(b) (49 U. S. Code 496), the Board is authorized to grant exemptions to air carriers rather than requiring the procurement of the certificate provided for in Section 401.

II. BAY AREA IS A COMMON CARRIER FOR COMPENSATION.

1. The operations of Bay Area.

Bay Area was originally formed for the purpose of securing cheap air transportation. As stated by the Board in its opinion, it was "motivated by a desire to obtain lower air freight rates * * *." (Board Opinion, Appendix, p. 2). And:

> "Both prior to and subsequent to incorporation new members were solicited for Bay Area from among the flower shippers in the San Francisco area by Mr. Reynolds and Mr. and Mrs. Decia, and later by Barulich for the express purpose of increasing the volume of Bay Area's shipments in order to obtain lower air freight rates" (Board Opinion, Appendix, p. 10).

In its brief, Bay Area insists that it was formed to procure a specialized trucking service for the handling of perishable flowers, to effect savings and economies in the cost of transportation and to afford a more closely consolidated operation between the shipper and the transportation agency. The Board findings, above set forth, refer only to cheap transportation and not to the other purposes stated. These findings are well supported by the testimony. In addition to the Board findings above set forth, the following appears in the Board Opinion, Appendix, page 11a:

> "Insofar as Bay Area association itself is concerned it is significant that the sole interest of the members is in securing the lowest possible air freight rates for transportation of their flowers to eastern markets. * * *."

Apparently the members did secure cheaper transportation. McPherson, the president of Airborne, testified:

> *"Airborne had been in operation three years and along came an organization, Bay Area, and took away a substantial part of our business.* We had formerly been an association of shippers, and the Civil Aeronautics Board had had a hearing and we had to participate, and had been told to get a certificate, and had gotten one." (Emphasis added.)

Bay Area has expanded its operations so that at the time of the hearing it had a membership of 26 flower growers and shippers in the San Francisco Area. They pool their small individual flower shipments into a large single shipment solely for the purpose of transportation by air at lower bulk rates (Board Opinion, p. 3). Not only had the membership of the organization expanded, but the number of consignees who used the transportation service rendered by Bay Area had risen to the number of 750 (Board Opinion, Appendix, p. 8).

2. Bay Area membership is open to all flower shippers in the San Francisco Bay Area.

It is obvious from the reading of the testimony that although Bay Area considers itself a small cohesive group not holding its service out to the public and thus attempts to avoid a designation as a common carrier, that this is not the fact. As a matter of fact, there was even testimony that a shipper not a member of Bay Area made use of its services.

Witness Lee, who has never been a member of Bay Area, testified that he shipped via the Bay Area service during the months of February, March, April, May and June, 1950 (Tr. p. 42-46). This period of time was a year after the formation of Bay Area. Testifying concerning these shipments it was stated (Tr. p. 52-53):

"Q. And those manifests reflect shipments which you made via the Bay Area Service for the dates indicated?

A. That is right.

Q. And to the consignees indicated?

A. That is right.

Q. Mr. Lee, when you started shipping over Bay Area what was the occasion? Did someone request that you ship, or was it your own idea?

A. It was requested by the consignee.

Q. What procedure did you follow to make those shipments over Bay Area?

A. The girl in the office, the shipping department, just called, I believe it was Mr. Reynolds, to pick up the shipments.

Q. I see. Were any questions asked about membership?

A. You mean of the girl?

Q. Yes.

A. No."

Witness Gregoire testified that he was solicited to join Bay Area (Tr. p. 120).

Witness Alexander testified (Tr. p. 143):

"Q. I see. After these original meetings, do you recall any discussion as to whom the members of the group could be?

A. It was open to all shippers and growers alike.

Q. What type of shippers and growers?

A. Flower shippers.

Q. All flower shippers and growers?

A. Yes, sir.

Examiner Walsh. You are speaking of the flower growers and shippers in this area?

The Witness. In this area, yes."

He further testified (Tr. p. 144) that the organization was open to all who signed a certain letter of April 4, 1949, and that the letter was presented to everybody; presented to at least 30 growers and shippers and that at that time there were about 50 growers and shippers in the area, and that if they were not contacted with the letter they were contacted by telephone.

Witness Walker of the Belmont Floral Service testified that Barulich and others asked him to become a member of Bay Area (Tr. p. 147).

Witness Piazza originally shipped by Bay Area and then stopped and after he ceased Bonaccorsi, a member and officer, requested him to continue in the organization (Tr. p. 166).

Virginia Decia, the original secretary-treasurer of Bay Area, testified that it was the policy of the association to accept as a member any responsible flower grower or shipper and that the organization was open to anyone, that there was no restriction (Tr. p. 214).

Witness Barulich, executive-secretary of Bay Area, testified (Tr. p. 299):

> "Q. Mr. Barulich, can you tell me, in your own knowledge has any application for membership in Bay Area ever been refused.
>
> A. To my knowledge, No."

Witness Zapettini, the first president of Bay Area, testified (Tr. p. 535):

> "Q. During the entire time of your administration, has any application for membership ever been refused?
>
> A. To the best of my recollection, no."

The foregoing proves conclusively that Bay Area membership has at all times been open to all flower growers and shippers in the San Francisco geographical area, and that no applicant has ever been refused admission.

3. Bay Area has consistently solicited the use of its transportation services by consignees.

The foregoing indicates that Bay Area at the San Francisco end held its services open to a large segment of the public by means of solicited membership. The only common interest of the membership was that all members were in the flower shipping business. This alone would be enough to show common carriage, but in addition the evidence clearly shows that Bay Area and its members *held Bay Area services out to any flower buyer in the United States who wanted to use them.* Witness Walker testified (Tr. pp. 148-9):

"Q. Have you received requests from your consignees to ship via Bay Area?

A. Yes, we have received requests, several of them.

* * * * * * *

The Witness. We had a request from Mr. Cereghino, who represents us in New York, on some of our colored merchandise, to ship through Bay Area. At the same time, we have had letters from various people from various markets, requesting Bay Area, which we have never paid any attention to, but just go along and ship the way we were."

Witness Gillo testified (Tr. p. 177-8):

"Q. Can you recall from memory the names of the customers who have specifically requested the Bay Area service during the recent period?

A. There has been quite a few of them, from time to time but I really could not name them off."

EA-323 was a letter written by Nuckton, a member and then president, explaining about Bay Area routing and definitely shows an attempt to sell the use of Bay Area services.

The correspondence between Bay Area and Cereghino, one of its eastern agents, indicates solicitation for the use of Bay Area services.

In the first letter, written by Barulich, there appears the following (Tr. p. 291):

"Contact the big florist houses in Philadelphia, and see if they can put some pressure on Bernacki to handle all the flowers in Phily. In

that manner, he will have to handle ours. His service is by far superior to our present trucker. *Our people have written to some of their outlets and asked for their support, but as yet no results.*" (Emphasis added.)

EA-190 is a letter written by Nuckton to Linwood Wholesale Florists in Detroit, Michigan. It is an obvious attempt to have the florists of Detroit use Bay Area services rather than the services provided by Airborne. Nuckton states, "it seems very difficult to get a foothold in Detroit," and the letter is a solicitation for the use of Bay Area services.

EA-189 is a letter written by Barulich to Seattle Flower Growers and ends up by stating: "For good service and reasonable rates insist that your flowers are routed by Bay Area."

Barulich made a trip east and called on florists in New York, Detroit, Kansas City and St. Louis (Tr. p. 301).

Witness Zappettini testified (Tr. p. 504):

"Q. In your office as President, to your knowledge, did Bay Area, as such, actively solicit any traffic from anyone other than its own members—solicit business, in other words?

A. Our office, you mean to say?

Q. No, Bay Area.

A. Bay Area ever solicit members?

Q. Solicit traffic.

A. Oh, yes, sure.

Q. And under whose auspices would that be done?

A. It would be done by the President or the Board of Directors, or the annual meeting, or semi-annual meeting, whatever it might be."

That the solicitation was successful appears in the testimony of Barulich (Tr. p. 577):

"Q. Approximately how many consignees would you say that Bay Area members ship to throughout the United States?

A. Oh, a rough estimate which we submitted to the Board of Directors on one of our stipulations, I believe, the figure used was in excess of 750, which was a rough tabulation.

Q. Are the consignees scattered throughout the forty-eight states of the United States, the District of Columbia, and, occasionally, Hawaii and Canada?

A. Yes. I don't believe I remember any Hawaiian shipments. There might have been one. I don't remember such a shipment."

The foregoing constitute only a few instances among the many attempts by Bay Area and its members to solicit the use of Bay Area service throughout the United States and actually to render Bay Area service when it was requested by the flower buyers. Certainly, it can well be said that Bay Area service was, and is, held out to the public and that the only qualification for the use of the service is that the user be in the flower business.

The California Supreme Court in *Landis v. Railroad Commission,* 220 Cal. 470, (31 P. 2d 345) at page 474 has stated:

> "His offer to the public was such that he could not with reason be classed as a private or contract carrier. True, his customers were limited to the particular class of those who desired the transportation of furniture and like personal effects. But those were the commodities which he offered to carry and his 'public' were they who desired the transportation of those commodities. As supplied to certain types of common carriers, *'the public does not mean everybody all the time'.*" (Emphasis added.)

It might be pointed out that Bay Area, the corporation, does not sell flowers—it sells service and its members sell the flowers, and the limitation of the service to one class of merchandise is insufficient to qualify Bay Area as a private carrier. The law is clear that the mere fact that a carrier ships only for those with whom it has a contract is also insufficient to eliminate the aspect of common carriage and, of course, the same would be true where the contract takes the form of a membership in a corporation.

In *Haynes v. MacFarlane,* 207 Cal. 529 (279 P. 436) the Court said at page 534:

> "The trial court found that the status of the defendant had not been changed by the so-called 'private contract' method of his operations and the record supports the finding and conclusion based thereon. If such a studied attempt to evade the provision of the statute should prove availing the law would become a nullity and the primary purpose of the act to regulate autotruck transportation companies would come to naught."

The application of the law of common carriage to a situation as is here presented is well stated in *In Re Pacific Motor Transport Company,* 38 Cal. R. Com. Rep. 874:

> "A misconception in regard to the nature of the common carrier has arisen through the use of the misleading expression that he 'undertakes generally and for all persons indifferently to carry goods and deliver them for hire.' As a matter of fact in a multitude of instances his offer relates to a very limited portion of the public, but is, of course, made to anyone of the public who chooses to place himself in the class to which the offer is directly made, and in this sense only is the undertaking general."

From the foregoing it is apparent that both at the San Francisco area, from whence Bay Area operates, to all points throughout the United States where it operates, or endeavors to operate, there is a complete factual situation showing that Bay Area is a common carrier.

Its organization is open to any flower shipper at the San Francisco end and to any flower buyer or consignee throughout the United States. It is not, in any sense of the word, a shipper organization dealing only with a limited group.

4. Bay Area operates as a common carrier for compensation.

Bay Area has argued that it does not operate for compensation or for hire. The Board has found that it does operate as a common carrier for compensation. (Board Opinion, Appendix, p. 12.)

The members on prepaid shipments pay Bay Area, the corporation, for its services, and on collect shipments the consignees pay. On collect shipments it does not matter a bit whether the sale is outright or on consignment; the charges for the service are, in both cases, paid by the consignee. Bay Area thus is acting for compensation every time it makes a shipment. It is true that a profit may not appear on the corporate books, but whether or not a corporation makes a profit does not mean it is not receiving compensation nor does it make it any less a common carrier.

In *Schenley Distillers Corporation v. United States,* 61 Fed. Supp. 981, (aff'd 326 U.S. 432, 90 L.Ed. 181), it was held that a Schenley subsidiary performing exclusive trucking service for its parent and affiliated companies was subject to regulation by the Interstate Commerce Commission as a contract carrier as having performed services for compensation even though it was reimbursed only for operating expenses.

The testimony is clear that Bay Area charged a total of 60 cents per box of flowers shipped for its services. From this amount Barulich received 55 cents for his trucking and handling charges and Bay Area retained 5 cents.

As pointed out above, the total charge on a prepaid shipment is paid by the shipper member and naturally must be reflected in the price of the flowers sold, which means that the burden ultimately falls on the purchaser of the flowers who, at the same time,

is purchasing the transportation services of Bay Area and paying therefor 60 cents per box. In the case of collect shipments, it is even clearer that the purchaser of the flowers directly pays this 60 cent charge for all collect shipments. This charge appears on the airbills to be collected from the consignees.

It seems clear that Bay Area receives gross compensation of 60 cents per box on each box of flowers shipped, and net compensation of 5 cents per box.

The fact that there may be no profit to Bay Area in the transaction is immaterial. There could be a profit if the per box charge was increased.

5. Pacific Coast Wholesalers Association v. United States is not applicable.

In its brief, Bay Area relies on the case of *Pacific Coast Wholesalers' Association et al v. United States,* 338 U.S. 689; 94 L.Ed. 474. That case is not applicable to the instant situation. The case dealt with the question of legislative exemption concerning surface freight forwarders as set forth in Section 402(c) of the Interstate Commerce Act. (49 U.S. Code 1002-(c)), (56 Stat. 284, amen. 64 Stat. 1113), which section exempts:

> "* * * the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload or other volume rates, * * *."

The precise issue in that case involved the question of exemption under Section 402(c) and we quote the language of the Court:

> "The *issue presented is whether this association,* with respect to the shipments here involved, *is subject to regulation* by the Interstate Commerce Commission as a freight forwarder *or stands in exempt status under section 402 (c) (1) of the Interstate Commerce Act.* This section reads as follows: 'The provisions of this part shall not be construed to apply (1) to the operations of a shipper or a group or association of shippers, in consolidating or distributing freight for themselves or for members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, * * *.' " (Emphasis added).

The Court then discussed the position of the Interstate Commerce Commission, as set forth in its decisions in the particular case. When the Commission first considered the matter, it determined that the exemption applied. Two years later the Commission reversed itself and held that the exemption applied only where the shipments were on an f.o.b. origin basis, and exemption did not apply where the shipments were f.o.b. destination or delivered price basis. The District Court reversed the Commission and determined that the Association was on a nonprofit basis and did not hold its service out to the public. After considering the prior decisions in the case the Supreme Court stated:

> "There is nothing in the language of the Act or the legislative history to suggest that Congress intended the exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b. destination (delivered price). On the contrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative. Under that test, the valid claim of the association to the statutory exemption is established by the original Commission decision."

A perusal of the statements of the Court, as quoted above, shows that the only issue which concerned the Supreme Court was whether or not the statutory exemption applied.

That decision in no way assists Bay Area in this case, as there is no statutory exemption in the Civil Aeronautics Act, nor has the Board exempted from regulation so-called nonprofit associations, and properly so, as such exemption would in no manner carry out the policy of the Board, as set forth in *Air Freight Forwarder Case,* 9 C.A.B. 473; (C.C.H. Current C.A.B. Cases p. 16,510), which granted exemption to air freight forwarders and prescribed regulations for their operation:

> "* * * we conclude that the public interest in and need for the service of air freight forwarders has been sufficiently established to justify the authorization of freight forwarder operations for a limited period during which essential experience can be developed upon which a permanent

policy may be soundly determined. During the period this authorization remains in effect *we will maintain a close and constant watch over the development of indirect air services not only to prevent practices that might prove detrimental to the development of a sound air transportation system* but also to insure the development of a valid and reliable record of experience upon which the contribution of the air freight forwarders may be properly appraised" (Emphasis added).

Bay Area argues that it has undertaken no responsibility in regard to non-members. This is placing the cart before the horse for if Bay Area is a common carrier the legal responsibility involved in carriage of freight exists, whether or not there is an express contract or any contract with the receiver of the freight to that effect.

From the foregoing, it is quite apparent that Bay Area is a common carrier despite the fact that it has changed the form of its organization several times in order to escape such a conclusion.

It holds its membership open to all flower shippers in the San Francisco geographic area and has never turned down an applicant. It holds its transportation services open throughout the United States for any buyer of flowers who desires to use it and has solicited buyers to use the service. It receives compensation for its transportation services to the extent of 60 cents per box of flowers, of which 5 cents per

box is net. It is acting as an indirect air carrier without any authority from the Civil Aeronautics Board and thus is in violation of Section 401(a) of the Act.

III. THE CEASE AND DESIST ORDER OF THE BOARD IS SUFFICIENTLY SPECIFIC.

Bay Area argues that the Board order is invalid because it does not specify the illegal activities of Bay Area.

It is quite obvious that the Board has ordered Bay Area to stop doing what it has been doing for the past several years. In other words, it should stop operating its transportation service as an indirect air carrier, and the members of Bay Area should ship their flowers from the San Francisco district in the same legal manner of air transportation as is followed by the flower shippers who are not members of Bay Area.

Bay Area relies upon *National Labor Relations Board v. Express Publishing Company,* 312 U.S. 426, 85 L. Ed. 930. That case does not express any new law; naturally an administrative order or a Court injunction should be sufficiently clear so that the persons enjoined may know what they are forbidden to do. The Court states:

> "The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indi-

> cated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

In the case of *Keeshin Motor Express v. Interstate Commerce Commission,* 134 F. (2d) 228, Ill.—Court of Appeals, Seventh Circuit (Certiorari denied by Supreme Court, 88 L. Ed. 427), the injunction provided that Keeshin was not to collect transportation charges other than those provided for in its published tariffs. The evidence presented consisted of tariff violations in certain districts and it was argued that the injunction should be confined to non-violation in those districts. The Court decided that the injunction was valid and violations in all districts would be enjoined.

The California Supreme Court has stated in *Gelfand v. O'Haver,* 33 Cal. (2d) 218, page 222 (200 P. 2d 790):

> "There can be no doubt that an injunction must not be uncertain or ambiguous and defendant must be able to determine from it what he may and may not do * * *. *It is also true, however, that resort may be had to the findings of fact and conclusions of law to clarify any uncertainty or ambiguity in a judgment."* (Emphasis added.)

In *City of Vernon v. Superior Court,* 38 Cal. (2d) 509, at page 514 (241 P. 2d 243), the Supreme Court further stated:

> "In arriving at a correct interpretation of the decree and its meaning and effect it is incumbent upon the court to consider not only the language of the decree * * * *but also the purpose and object of the litigation which terminated in the decree."* (Emphasis added.)

This last quotation relied upon by the California Court was from a Utah decision, *Ophir Creek Water Company v. Ophir Hill Consolidated Mining Company,* 216 P. 490.

Applying the foregoing law, it can be seen that resort may be had to the Board order, to the findings of fact and conclusions of law, and to the purpose and object of the investigation proceedings. It would have been useless for the Board to have reincorporated in its cease and desist order a complete restatement of its opinion containing the findings and conclusions. It will be noted that the order to cease and desist itself contains the following language:

> "* * * having issued its opinion containing its findings, conclusions and decision, *which is attached hereto and made a part hereof;"* (emphasis added).

The order thus is not the single page relied upon by Bay Area but the entire opinion, decision, findings and conclusions. It is quite apparent that Bay Area knows the purpose of the litigation and those acts which it should refrain from performing.

IV. THE BOARD DID NOT ABUSE ITS DISCRETION IN REFUSING TO STAY THE EFFECTIVE DATE OF THE ORDER UNTIL THE TERMINATION OF PROCEEDINGS IN DOCKET 5947.

The *Air Freight Forwarder Case,* supra, permitted the operation of air freight forwarding for a period of five years. At the time of deciding the *Air Freight Forwarder Case,* the Board issued Economic Regulations Part 296 setting forth the method under which air freight forwarders could operate by procuring letters of registration. The five year period was to terminate in the Fall of 1953 and in February, 1953, at the same time the order on review was issued, the Board created Docket 5947 and ordered an investigation concerning the renewal of Part 296 and an investigation of indirect air carriage of property. The order bears the number E-7141 and appears in the transcript at page 406. A reading of that order indicates that its purpose is a complete investigation of all indirect air carriage of property including an investigation of shippers' associations. It made parties to the proceeding a number of so-called shippers' associations, including Bay Area.

Bay Area's final point is that the Board abused its discretion in refusing to stay the cease and desist order on review until the termination of Docket 5947, on the ground that if an exemption were to be granted to shippers' associations in that docket there would be an injustice done to the Bay Area members. It should be a sufficient answer to state merely that this Honorable Court has in effect already passed upon this point.

It will be recalled that the petition for review filed by Bay Area herein on April 8, 1953 (Tr. p. 413) was accompanied by a motion to stay the effective date of the Board order pending this review and also pending the conclusion of proceedings in Docket 5947.

This Court on June 12, 1953 dismissed the petition on the ground of lack of jurisdiction but on leave thereafter granted on June 30, 1953 permitted the late filing of the petition and Bay Area's motion for a stay.

The decision of the Court was that the Board order should be stayed until decision by the Court on the merits of the petition of review. By failing to stay the Board order pending the conclusion of Docket 5947, it is assumed that the Court denied that portion of Bay Area's motion. This was indeed quite proper as Section 1006(d) of the Act (49 U. S. Code 646d) gives the Court the power to grant interlocutory relief which, of course, means only during the pendency of the review and not during the pendency of a completely extraneous proceeding.

However, on the merits, it is clear that the Board did not abuse its discretion. At page 396 of the transcript appears the Board opinion and order on reconsideration and request for stay. The Board opinion sets forth (Tr. p. 402) the various reasons why it would not stay its order until the conclusion of Docket 5947.

The opinion states that even if Bay Area were to terminate its operations, it does not follow that such action would have a serious adverse effect upon Bay Area members or the industry as a whole. The Board points out that even though Bay Area handles a substantial portion of the flower movement by air from San Francisco, it does not follow that the operations of shippers who do not use Bay Area are not profitable. Otherwise, Bay Area would have the business of all the San Francisco flower shippers. As a substantial portion of flower shipments by air is not handled by Bay Area, the termination of Bay Area services would not have an adverse economic effect upon the entire flower industry.

There is adequate air service from San Francisco by regulated forwarders, and it is to be noted that for a certain period in 1950 when Bay Area was inactive Airborne handled all of Bay Area's shipments. It is also to be noted that many members of Bay Area do not use its services exclusively. (Tr. p. 384.)

The Board (Tr. p. 403) states:

> "We do not believe that Congress intended that nonprofit associations competing directly with carriers subject to regulation should escape regulation merely because of their form of organization."

We have pointed out earlier in this brief the comparatively few types of commodities that are shipped by air and that if a shippers' association were to be formed under the guise of a nonprofit undertaking

by shippers of each of the various types of commodities, it would not be long before regulated air freight forwarders would be out of business. The Board (Tr. p. 404) states:

> "Should the concept of associations of shippers spread, as it doubtless would were we to exempt Bay Area, the impact upon the air forwarding industry might well be disastrous."

The Board, of course, is concerned with the public interest as it must be under the declaration of policy contained in the Act (Section 2) (49 U. S. Code 402) and undoubtedly Docket 5947 will determine the extent to which the public interest requires regulation or nonregulation of shippers' associations.

In *W. R. Grace & Company v. C. A. B.*, 154 F. 2d 271, the Court of Appeals for the Second Circuit stated:

> "With increasing emphasis, the Supreme Court has admonished us that, in court review of such administrative orders as this now before us, the public interest looms large."

So far as industry harm is concerned, it would seem that if all flower shippers were placed on a fair competitive basis it would follow that the entire industry should benefit rather than suffer. If in such a case the demand for flowers in the eastern markets falls below the supply, there would be an equal possibility of survival among all of the flower shippers. If the cease and desist order does not become effective for an indefinite period and the Bay Area members remain in a preferred position, then the chance of

survival would be heavily against that portion of the industry which is outside the membership of Bay Area.

Under the Administrative Procedure Act (5 U. S. Code 1009(e)), (60 Stat. 243), a reviewing Court may hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Certainly a review of this record does not indicate that the Board was arbitrary or capricious or that it abused its discretion. No procedural violations are alleged nor is there an attack made on any of the findings set forth in the Board order refusing the requested stay of the cease and desist order. It is really only a question as to whether the Board was reasonable and whether its order was a rational conclusion and not so unreasonable as to be capricious, arbitrary or abuse of discretion. (*Willapoint Oysters v. Ewing,* 174 F. 2d 676.)

The action of the Board in refusing the stay requested was purely discretionary and the Board did not abuse its discretion in denying the request.

It is respectfully submitted that the Board order or orders under review be affirmed.

Dated, San Francisco, California,
March 1, 1954.

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